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AMENDED IN SENATE MARCH 29, 2001

SENATE BILL**No. 771**

Introduced by Senator Figueroa

(Principal coauthor: Senator Burton)

(Principal coauthor: Assembly Member John Campbell)

(Coauthor: Senator Karnette)

*(Coauthors: Assembly Members Alquist, Aroner, ~~Bates~~, Havice,
Keeley, Richman, Shelley, and Strom-Martin)*

February 23, 2001

An act to add Article 8 (commencing with Section 17590) to Chapter 1 of Part 3 of Division 7 of the Business and Professions Code, relating to advertising.

LEGISLATIVE COUNSEL'S DIGEST

SB 771, as amended, Figueroa. Unsolicited and unwanted telephone solicitations.

Existing law prohibits certain unfair business practices, including certain advertising practices.

This bill would require the Department of Consumer Affairs, *not later than January 1, 2003*, to maintain a “do not call” list, containing the telephone numbers *and ZIP Codes of residential or wireless* telephone subscribers who do not wish to receive unsolicited and

unwanted telephone calls from telephone solicitors. It would prohibit, subject to certain exceptions, a telephone solicitor from calling any telephone number, beginning on or after the 31st day after the then current “do not call” list becomes available, to, among other things, seek to *offer a prize, or to* rent, sell, exchange, promote, gift, or lease any goods or services. It would also prohibit persons who sell, lease, exchange, or rent telephone solicitation lists, except for directory assistance and telephone directories sold by telephone companies, from including in their lists telephone numbers that appear on the then current “do not call” list. Fees paid ~~by telephone solicitors~~ *in connection with the “do not call list”* would be deposited in the Special Telephone Solicitors Fund created by the bill.

Existing law makes it a crime to violate any of the provisions governing advertising. By adding these new prohibitions to those provisions, this bill would expand the scope of an existing crime, thereby imposing a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Article 8 (commencing with Section 17590) is
2 added to Chapter 1 of Part 3 of Division 7 of the Business and
3 Professions Code, to read:

4

5 Article 8. Unsolicited and Unwanted Telephone Solicitations

6

7 17590. (a) There is a compelling state interest to protect the
8 privacy of *residential or wireless* telephone subscribers who wish
9 to avoid unsolicited and unwanted telephone solicitations. *For the*
10 *purposes of this article, a residential or wireless telephone*
11 *subscriber shall be referred to as a subscriber.*



(b) The act of becoming a ~~telephone~~ subscriber should not undermine or lessen a person's right of privacy as guaranteed under Section 1 of Article I of the California Constitution.

17591. (a) The Department of Consumer Affairs shall *not later than January 1, 2003*, maintain a "do not call" list, updated no less frequently than quarterly, which shall set forth the *California* telephone numbers *and ZIP Codes*, but not the names or addresses, of ~~telephone~~ subscribers, arranged by area code and numerical sequence, who do not wish to receive unsolicited and unwanted telephone calls from telephone solicitors as defined in Section 17592. The "do not call" list shall indicate any exclusions designated by the ~~telephone~~ subscriber as provided in subdivision (b).

(b) ~~Telephone subscribers~~ *Subscribers* may place their telephone numbers *and ZIP Codes* on the "do not call" list in the manner prescribed by the department. *The subscriber's placement on the "do not call list" shall expire three years after the date on which the subscriber's telephone number and ZIP Code first became available on the list to telephone solicitors. The department shall triennially charge these subscribers a fee not to exceed one dollar (\$1.00).* A ~~telephone~~ subscriber may exclude from the coverage of the "do not call" list telephone calls from entities identified by the ~~telephone~~ subscriber. The ~~telephone~~ subscriber shall designate any exclusions in the manner prescribed by the department.

(c) Telephone solicitors, as defined in Section 17592, shall obtain copies of the "do not call" list by paying a fee to the department in an amount not to exceed the costs incurred by the department in the preparation, production, and distribution of that list. *The department shall establish a sliding scale fee schedule, charging a telephone solicitor with more than 1,000 employees the maximum fee and charging a telephone solicitor with fewer than five full-time employees no fee. The department shall provide a telephone solicitor the option of paying this fee on a quarterly or annual basis.* The department shall offer a statewide list and shall also offer lists of areas within the state. The determination of the number and definition of areas shall be within the discretion of the department.

(d) *The department shall utilize the best available, cost-effective technology to ensure that subscribers may easily*

1 place their telephone numbers on the “do not call” list. This
2 technology includes, but is not limited to, methods by which a
3 subscriber may effect placement on the list by using a
4 state-designated Internet Web site or a designated, statewide
5 toll-free telephone number. The department shall also utilize the
6 best available, cost-effective technology to ensure that telephone
7 solicitors may easily obtain and manipulate the “do not call” list.
8 This technology includes, but is not limited to, methods that are
9 computer compatible and that allow the downloading of the list
10 and the sorting of the list by ZIP Code and that make the list
11 available on CD-ROM.

12 (e) It is the intent of the Legislature that the fees paid to the
13 department by telephone solicitors and subscribers be utilized by
14 the department in carrying out this article ~~and shall~~. The
15 department shall annually reduce the amount of the fee paid by
16 subscribers and telephone solicitors set forth in this section based
17 on revenue history and costs so that the fees do not exceed the
18 actual estimated costs in carrying out this article. The fees obtained
19 by the department shall be deposited in the Special Telephone
20 Solicitors Fund, which is hereby created. All moneys in the fund
21 shall be subject to annual appropriation in the Budget Act.

22 ~~(e)~~

23 (f) A person or entity that obtains a “do not call” list shall not
24 use the list for any purpose other than to comply with this article.
25 These unlawful purposes include, but are not limited to, causing
26 a subscriber to participate in and be included on, the “do not call”
27 list without the subscriber’s knowledge or consent, selling or
28 leasing the “do not call” list to a person other than a telephone
29 solicitor, selling or leasing by a telephone solicitor of the “do not
30 call” list, and a telephone solicitor persuading a subscriber with
31 whom it has an established business relationship to place his or her
32 telephone number on the “do not call” list, if the solicitation has
33 the effect of preventing competitors from contacting that solicitor’s
34 customers.

35 17592. (a) For purposes of this article, a “telephone
36 solicitor” means any person or entity who, on his or her own
37 behalf or through salespersons or agents, automatic dialing
38 announcing devices, or otherwise, makes or causes a telephone
39 call to be made to a California telephone number that does any of
40 the following:



(1) Seeks *to offer a prize or* to rent, sell, exchange, promote, gift, or lease goods or services or documents that can be used to obtain goods or services.

(2) Offers or solicits or seeks to offer or solicit any extension of credit for personal, family, or household purposes.

(3) Seeks marketing information that will or may be used for the direct solicitation of a sale of goods or services to the telephone subscriber.

(4) Seeks to sell or promote any investment, insurance, or financial services.

(5) ~~Seek~~ *Seeks* to make any telephone solicitation or attempted telephone solicitation as described in Section 17511.1.

(b) Except for telephone calls described in subdivision (d), beginning on the 31st day after the current “do not call” list becomes available, no telephone solicitor shall call any telephone number on the then current “do not call” list and do any of the following:

(1) *Seek to offer a prize or* to rent, sell, exchange, promote, gift, or lease goods or services or documents that can be used to obtain goods or services.

(2) Offer or solicit or seeks to offer or solicit any extension of credit for personal, family, or household purposes.

(3) Seek marketing information that will or may be used for the direct solicitation of a sale of goods or services to the telephone subscriber.

(4) Seek to sell or promote any investment, insurance, or financial services.

(5) Seek to make any telephone solicitation or attempted telephone solicitation as described in Section 17511.1.

(c) No person or entity that sells, leases, exchanges, or rents telephone solicitation lists, except for directory assistance and telephone directories sold by telephone companies or their affiliates, shall include in those lists those telephone numbers that appear on the current “do not call” list.

(d) Subdivision (b) shall not apply to any of the following:

(1) Telephone calls made in response to the express ~~written request of, an advertisement by, or based upon the prior written permission of, the telephone subscriber as obtained through the process described in subdivision (c).~~ As used in this paragraph, “express written request” or “prior written permission” means a

1 ~~request or permission evidenced by a document signed by the~~
2 ~~telephone subscriber and does not include a request or permission~~
3 ~~communicated orally, either in person or over the telephone.~~
4 ~~“Express written request” or “prior written permission” also does~~
5 ~~not include any request or permission provided at the time or place~~
6 ~~of the purchase, rental, lease, exchange, or promotion of goods or~~
7 ~~services or included in any contract of adhesion.~~ *request of the*
8 *subscriber called, if the request was made prior to the telephone*
9 *call to the subscriber; an advertisement by the subscriber; or in*
10 *response to the express, written permission of the subscriber*
11 *obtained pursuant to subdivision (e). “Express request” or “prior*
12 *written permission” does not include any consent or permission*
13 *included in any contract of adhesion. “Express request” may*
14 *include a telephone call from a person or entity who has been*
15 *provided the subscriber’s telephone number and name as a referral*
16 *from a solicitor with which the subscriber has an established*
17 *business relationship, if that solicitor has obtained the*
18 *subscriber’s express request for the referral. A telephone call is not*
19 *made at the express request of a subscriber if the call is made after*
20 *the first to occur of the following:*

21 (A) *Twenty-one business days after the last date on which the*
22 *subscriber contacted a business with the purpose of inquiring*
23 *about the potential purchase of goods or services.*

24 (B) *Twenty-one days after the last date on which the subscriber*
25 *consented to be contacted.*

26 (C) *A request by the subscriber that no further telephone calls*
27 *be made to him or her.*

28 (2) Telephone calls made in connection with the collection of
29 a debt or the offer by a creditor to the ~~telephone~~ subscriber of an
30 extension of credit to pay a delinquent obligation owed by the
31 ~~telephone~~ subscriber to that creditor.

32 (3) Telephone calls that the ~~telephone~~ subscriber excluded
33 from the coverage of the “do not call” list as provided in
34 subdivision (b) of Section 17591.

35 (4) Telephone calls made to a ~~telephone~~ subscriber if the
36 telephone solicitor has an ~~existing~~ *established* business
37 relationship with the ~~telephone~~ subscriber. As used in this
38 paragraph, ~~“existing”~~ *“established business relationship”* means a
39 relationship formed by a voluntary, two-way communication
40 between a telephone solicitor and a ~~telephone~~ subscriber with or

1 without an exchange of consideration, on the basis of an
2 application, purchase, rental, lease, or transaction *if the*
3 *relationship has not been terminated by the subscriber or the*
4 *solicitor*. This term also includes a relationship with a nonprofit
5 entity formed through means such as previous donations to the
6 nonprofit entity or participation in or attendance at, events held by
7 the nonprofit entity. *If a subscriber purchases or obtains a product*
8 *or service through a licensed agent or broker, an established*
9 *business relationship is created with the licensed agent or broker*
10 *individually, apart from and in addition to, any established*
11 *business relationship that may have been created by a licensed*
12 *agent or broker acting on behalf of another, and the licensed agent*
13 *or broker is a telephone solicitor, as defined in subdivision (a).*
14 Notwithstanding the provisions of this paragraph, an ~~existing~~
15 *established business relationship* does not exist between the
16 ~~telephone~~ subscriber and any separate legal entity associated with
17 the telephone solicitor not acting as an agent or vendor on behalf
18 of the telephone solicitor ~~in the sale or marketing of the solicitor's~~
19 ~~goods or services. These separate legal~~, as defined in subdivision
20 (a), *unless the separate legal entity shares the brand name of a*
21 *business with which the subscriber has an otherwise established*
22 *business relationship. If a separate legal entity with which a*
23 *subscriber does not otherwise have an established business*
24 *relationship telephones a subscriber on the basis that the entity*
25 *shares the brand name, and the subscriber instructs the entity to*
26 *place the subscriber on the entity's "do not call" list pursuant to*
27 *Section 64.1200 of Title 47 of the Code of Federal Regulations and*
28 *Part 310 of Title 16 of the Code of Federal Regulations, that*
29 *instruction shall be binding on the entity with which the subscriber*
30 *has the established business relationship, with the entity that has*
31 *the shared brand name, and all other entities that share that brand*
32 *name. Separate legal entities include, but are not limited to, any*
33 *parent company or entity, any subsidiary company or entity, any*
34 *partnership or copartner, any joint venture or venturer, association*
35 *member, or comember, or any affiliated company or entity.*
36 (5) *Telephone calls made by an individual businessperson or a*
37 *small business if the individual businessperson or small business*
38 *employs no more than five full or part-time employees or*
39 *independent contractors, the individual businessperson or a*
40 *principal of the small business makes the telephone calls himself*

1 or herself for the sale of goods or services offered by that individual
2 businessperson or small business, and the telephone calls are
3 made to subscribers within a 50-mile radius of the location of the
4 individual businessperson or small business. For purposes of this
5 section, the services offered by the individual businessperson or
6 small business cannot be telemarketing services. For purposes of
7 this section, those independent contractors and employees with
8 whom an individual businessperson or a small business is required
9 to have a written independent contractor or employment
10 agreement pursuant to a regulatory scheme to ensure regulatory
11 accountability of those independent contractors or employees, are
12 not counted against the total referenced above.

13 (e) Nothing in this section prohibits a telephone solicitor from
14 contacting by mail a ~~telephone~~ subscriber whose telephone
15 number appears on the “do not call” list to obtain the subscriber’s
16 express, written permission allowing the telephone solicitor to
17 make the calls described in subdivision (b). In any dispute
18 regarding whether a ~~telephone~~ subscriber has provided this
19 express, written permission, the telephone solicitor has the burden
20 of proving that the subscriber has provided this permission by
21 producing the original documents, signed by the subscriber,
22 evidencing that permission.

23 17593. (a) Any person who has received a telephone
24 solicitation that is prohibited by Section 17592 or whose telephone
25 number was used in violation of subdivision (e) of Section 17591,
26 may bring a civil action in any court of competent jurisdiction
27 against a telephone solicitor to recover or obtain any one or more
28 of the following remedies:

29 (1) An order to enjoin the violation.

30 (2) A civil penalty of up to five hundred dollars (\$500) for the
31 first violation and up to one thousand dollars (\$1,000) for a second
32 and each subsequent violation.

33 (3) Court costs, including reasonable attorney’s fees.

34 (4) Any other relief that the court deems proper.

35 (b) Nothing in this article shall limit the enforcement
36 provisions under Chapter 5 (commencing with Section 17200) of
37 Part 2.

38 (c) The rights, remedies, and penalties established by this
39 article are in addition to the rights, remedies, or penalties
40 established under other laws.

(d) It shall be an ~~affirmation~~ *affirmative* defense to any action brought under this section or any other law, that the violation was accidental and in violation of the telephone solicitor's policies and procedures and telemarketer instruction and training.

17594. A "do not call" list prepared or maintained by the department and any information submitted to the department by a subscriber for use in preparing or maintaining that list shall not be disclosed pursuant to a request made under Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code.

17595. If a federal agency, pursuant to paragraph (3) of subsection (c) of Section 227 of Title 47 of the United States Code, establishes a single national data base of telephone numbers of subscribers who object to receiving telephone solicitations the department shall include the part of that single national data base that relates to California in the 'do not call' list established by Section 17591.

SEC. 2. The provisions of this act are severable. If any provision of this article or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

~~SEC. 2.~~

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

CORRECTIONS

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